

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 1022 OF 2003

Ramkumar Jalan Public Charitable

Trust and others.

... Appellants.

Versus.

Kasam Ali Momin.

... Respondents.

Shri Jitendra Damani for the Appellants.

Shri M.V.Pandye for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 3rd May, 2005.

P.C.:

1. Admit. The Respondent waives service. Taken up for

hearing forthwith. Heard the learned Counsel appearing

for the parties.

2. The Notice of Motion is taken out by the original

Plaintiffs for restoration of the suit which was

dismissed for default. The suit was dismissed for

default on 17th January 2001 and the Notice of Motion

was taken on 31st January 2001.

3. The learned trial Judge has dismissed the Notice of

Motion by holding that after the suit was dismissed a

substantive suit has been filed by the

Appellants/Plaintiffs pursuant to the leave granted

under Order II Rule 2 of the Code of Civil Procedure,

1908. The learned trial Judge held that in view of the

filing of the subsequent suit it was not necessary to restore the suit filed by the Appellant which was dismissed for default. The learned trial Judge has also noted that an application was made by the Respondent praying for dismissal of the suit.

4. After having heard the learned Counsel appearing for the parties I am of the view that the impugned order is unsustainable. The learned trial Judge while considering the Notice of Motion was really concerned with the case made out by the Appellants for remaining absent on the date on which the suit was dismissed for default. In support of the Notice of Motion, an affidavit was filed by the Constituted Attorney of the Appellants setting out the reasons why no one was present on 17th January 2001. He has stated that the Advocate appearing for the Appellant was busy in attending to one matter in this Court. It is to be noted here that within 14 days from the date of dismissal of the suit, the present Notice of Motion was taken out. What is the effect of subsequent suit filed by the Appellants is a matter to be considered after the suit is restored.

5. The learned trial Judge ought to have adopted a liberal approach in the matter. The prejudice which could have been caused to the Respondent could always be compensated by ordering payment of costs.

6. Hence the Appeal deserves to be allowed and the following order is passed:

(i) The impugned Judgment and order dated 30th April 2001 is quashed and set aside. Notice of Motion No.460 of 2001 is made absolute in terms of prayer clause (a) subject to the Appellant paying costs of Rs.5000/- to the Respondent within a period of four weeks from today. The payment of costs will be condition precedent.

(ii) After the suit is restored, it will be open for the Respondent to revive the application made by him for dismissal of the suit. Such an application will be decided by the learned trial Judge on its own merits without being influenced by the fact that the impugned order has been set aside.

(iii) The parties to act and the concerned Court to act on authenticated copy of this order.

Judge.